

WEST VIRGINIA LEGISLATURE
Joint Committee on Government and Finance

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Aaron Allred

Legislative Manager
Legislative Auditor

November 18, 2014

The Honorable Jeffrey V. Kessler, President
West Virginia State Senate
Post Audits Sub-Committee, Co-Chair
Room 227 M, Building 1
State Capitol Complex
Charleston WV 25306

The Honorable Timothy R. Miley, Speaker
West Virginia House of Delegates
Post Audits Sub-Committee, Co-Chair
Room 228 M, Building 1
State Capitol Complex
Charleston, West Virginia

Re: Hatfield McCoy Regional Recreation Authority

Dear Mr. President and Mr. Speaker:

The Post Audit Division is currently engaged in a review of the revenues and expenditures of the Hatfield McCoy Regional Recreation Authority (HMRRA) as a spending unit of the state government. Although this review is not yet complete, we have found several areas in which the HMRRA has repeatedly not followed state laws regarding the handling and use of public funds. Either through ignorance, misinterpretation, or for some other reason, the HMRRA has conducted its business as if these laws do not apply to it.

SUMMARY

Based upon the research and analysis of attorneys on my staff, the position of my office is as follows:

- The HMRRA is a spending unit of the state government and is therefore required to follow the laws and rules regarding the purchase of goods and services;

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- The HMRRA has statutory authority to contract for its own legal services, but as a spending unit the HMRRA is also obliged to submit its purchasing contracts to the Attorney General for review as to form;
- The members of the HMRRA board are 'public officials' and the HMRRA's employees are 'public employees' within the meaning of the West Virginia Governmental Ethics Act and are, therefore, subject to its requirements and prohibitions;
- The HMRRA is a spending unit that is required to deposit its revenues in a manner, and in an institution, to be approved by the State Treasurer; and
- Employees of HMRRA are 'public servants' and, pursuant to the West Virginia Constitution, they are not eligible to receive bonuses for the work they have performed for the HMRRA.

DETAIL

Here is the statutory and constitutional basis for this position.

1. Application of Purchasing Laws

The state purchasing laws are set forth in Article 3 of Chapter 5A of the West Virginia Code. Section 1 of this article plainly states, "The provisions of this article apply **to all of the spending units** of state government, except as otherwise provided by this article or by law," W. Va. Code §5A-3-1(c) (emphasis added). For most of the relevant period, a spending unit has been defined in Chapter 5A as a "department, agency or institution of the state government for which an appropriation is requested, or to which an appropriation is made by the Legislature," W. Va. Code §5A-1-1(21).¹ Based upon this definition, an institution of the state government that receives a legislative appropriation is obligated to comply with state purchasing laws.

The HMRRA was established by the Legislature in 1996 as a 'public corporation and a governmental instrumentality exercising public powers of the State,' W. Va. Code §20-14-5. In light of this language, we conclude that the Authority is an institution of the state within the historic definition of W. Va. Code §5A-1-1(21).

The remaining element is whether the HMRRA has received appropriations from the Legislature. It appears that the HMRRA has been receiving funds from the Legislature for much of

¹ In the 2014 Regular Session, the Legislature amended this definition to include more variations of the words "agency or institution" and now the definition explicitly includes an "authority" within the definition of a spending unit.

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its existence, although it has only recently been listed as a specific line item in the budget bill. From 2011 through 2014, for instance, the Legislature has appropriated over \$200,000 per year to the West Virginia Development Office with designation for the "Hatfield McCoy Recreational Trail." In addition, the Legislature has established in code that the HMRRA shall receive ten percent of the rebate funds received from the state purchasing card program. This law went into effect in 2007 and in recent years, the budget bill specifically mentions appropriation of this money to comply with this law, W. Va. Code §12-3-10d.

Based upon the Code and the Legislature's practice of financial support of the HMRRA, it is clear that the HMRRA should be complying with the provisions of state law regarding the purchase of goods and services including, for example, the requirements to seek competitive bids, to purchase from state master contracts, and to have purchase contracts reviewed by Attorney General and, in certain circumstances, filed with the State Auditor.²

2. Application of West Virginia Governmental Ethics Act

West Virginia Code §6B-2-5 is the section of the West Virginia Governmental Ethics Act that contains the specific provisions limiting the exploitation of public office for personal, private gain. It begins as follows:

"The provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency . . .," W. Va. Code §6B-2-5(a).

Under the Ethics Act, the laws apply to the person, not to the agency. The prohibitions apply to "public officials" and "public employees." The Act defines a "public official" as follows:

"'Public official' means any person who is elected or appointed to any state, county or municipal office or position and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a *de minimis* nature

² The Post Audit Division has also become aware of certain leases for real estate that may be subject to the Department of Administration's real estate program, but the Post Audit Division does not yet have sufficient information to determine what, if any, state law may govern these transactions.

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on the interest or interests of any person." W. Va. Code §6B-1-3(k).

Since the voting members of the board of the HMRRA are appointed to positions in which they take official action that the Legislature has recognized as having substantial economic impact, the board members meet the definition of "public official" under the Ethics Act.

The Ethics Act also applies to the employees of the HMRRA. The Ethics Act defines "public employee" as "any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards," W. Va. Code § 6B-1-3(j). This language is certainly broad enough to include the HMRRA, which is described as a "public corporation and governmental instrumentality exercising the public powers of the State."

For these reasons, the board members and the employees of the HMRRA are subject to the provisions of the Ethics Act, which prohibits self-dealing and personal gain from their public office.

3. Application of Deposit and Banking Laws

The HMRRA collects revenue from several sources. These include the sale of bonds and certain security interests, and the charging of fees for use of the Recreation Area. The Code explicitly declares that the revenue bonds and revenue refunding bonds of the HMRRA do not constitute debts of the state, W. Va. Code §20-14-7. As for the collection of fees, the Code provides that the HMRRA is "to retain and utilize that revenue for any purposes consistent with this article," W. Va. Code §20-14-5(30).

Although these revenues do not fall within the category of "funds due the State," these revenues are still subject to some oversight by the State Treasurer. West Virginia Code §12-2-3 provides explicit requirements for approval by the State Treasurer of the manner and location of the deposits of funds collected by officials and employees:

- "(a) All officials and employees of the State authorized to accept moneys that the State Treasurer determines or that this code specifies are not funds due the State . . . shall deposit the moneys, as soon as practicable, in the manner and in the depository specified by the State Treasurer. The State Treasurer shall prescribe the forms and procedures for depositing the moneys.
- (b) Notwithstanding any provision of this code to the contrary, . . . a spending unit shall comply with the State Treasurer's procedures for the receipt and disbursement of moneys not due the state and obtain written authorization from the State Treasurer before depositing any moneys in an account outside the Treasury. . . "

The board of the HMRRA has a great deal of latitude to maintain "such sinking funds and reserves

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as the board determines appropriate" to meet its financial needs and obligations, but its revenues are still subject to the checks and balances established for the control and protection of public money. Independent audits of the HMRRA's financial statements have identified and reported several arrangements, flagged as "Related Part Transactions," through the years. Seven instances were identified for the 2012 calendar year and eight instances were identified for 2013. (Copies of these reports are attached.)

4. **Emoluments Clause of the Constitution of West Virginia**

As the members of the Subcommittee are probably aware, state agencies and institutions are not permitted to pay bonuses to employees receiving regular salaries. This prohibition comes directly from our state Constitution. In a section commonly called the "Emoluments Clause" of our Constitution, the pertinent language is as follows:

"No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made; nor shall any Legislature authorize the payment of any claim or part thereof, hereafter created against the state, under any agreement or contract made, without express authority of law; and all such unauthorized agreements shall be null and void . . ." W. Va. Const. Art. VI, §38 (emphasis added).

Though most of the court decisions that have considered this clause focused on the term "public officer," this section is widely understood as a prohibition on paying bonuses to public employees. This section's phrase "public officer, agent, servant or contractor" may be logically parsed to apply to public servants just as it does to public officers. This is also true for public contractors. Because of the prohibition in this section of the Constitution, the HMRRA cannot pay bonuses to its employees, regardless of whether they are salaried or contract employees.

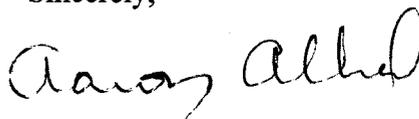
CONCLUDING REMARKS

The laws discussed in this letter are not mere bureaucratic hoops and tests. They are important controls on the management of public money and they are designed to prevent abuse and waste. The HMRRA must consider how these laws apply to their operations and comply with them as they carry out their business on behalf of the people they serve.

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When the Post Audit Division sought comment from the Hatfield McCoy Regional Recreation Authority on this, the Executive Director responded in writing. His letter does not deny the applicability of these various laws, although he did raise questions about the specific circumstances that caused this inquiry. He also stated, "The Authority is most willing to adapt its practices in this regard to comply with all applicable state code and looks forward to working with your office to bring the Authority in to full compliance."

Sincerely,



Aaron Allred

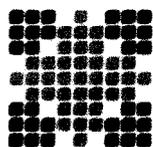
cc: Mr. Jeffrey T. Lusk, Executive Director, HMRRA
The Honorable Patrick Morrissey, Attorney General
The Honorable Glenn Gainer, State Auditor
The Honorable John Perdue, State Treasurer
Mr. Jason Pizatella, Acting Secretary, Department of Administration
Mr. David Tincher, Director, Purchasing Division
Ms. Rebecca L. Stepto, Executive Director, WV Ethics Commission

Enclosures

**HATFIELD-MCCOY REGIONAL
RECREATION AUTHORITY**

***Financial and
Compliance Report***

December 31, 2012



**arnett
foster
toothman** plc
CPAs & Advisors

HATFIELD-MCCOY REGIONAL RECREATION AUTHORITY

NOTES TO FINANCIAL STATEMENTS

Effective July 1, 2012, the employer contribution percentage decreased from 14.5% to 14.0%. Covered employees are required to contribute 4.5% of their salary to the PERS while the Authority is required to contribute 14.0% of covered employee's salaries to the PERS. The required employee and employer contribution percentages are determined by actuarial advisement within ranges set by statute. A summary of the Authority and employee contributions required and made for the following years ended December 31, are as follows:

	2012	2011	2010
Total payroll	<u>\$ 766,883</u>	<u>\$ 724,574</u>	<u>\$ 718,418</u>
PERS payroll for covered employees	<u>\$ 421,364</u>	<u>\$ 424,588</u>	<u>\$ 416,970</u>
Authority contributions	77,774	85,111	60,375
Employee contributions	<u>24,561</u>	<u>24,465</u>	<u>23,138</u>
	<u>\$ 102,335</u>	<u>\$ 109,576</u>	<u>\$ 83,513</u>

Note 7. Grant Revenues

Grants revenues recognized during the years ended December 31, 2012 and 2011, consisted of the following:

	2012	2011
West Virginia Division of Highways	\$ 209,998	\$ 48,090
Federal Emergency Management Agency	123,969	-
Twin Falls Foundation	45,000	-
West Virginia Division of Tourism	36,719	15,847
West Virginia Division of Culture & History	9,500	-
Total grant revenues	<u>\$ 425,186</u>	<u>\$ 63,937</u>



Note 8. Related Party Transactions

The Authority leases an industrial storage building from the Wyoming County Economic Development Board, for which one Authority board member is an employee and one Authority member and the Authority's Executive Director serve on its Board, under an operating lease on a month-to-month basis. Rent expense for the operating lease was \$13,500 and \$6,750 for the years ended December 31, 2012 and 2011, respectively. No amounts are due and payable under this arrangement as of December 31, 2012 and 2011.

The Authority obtained liability insurance through an insurance agency owned by a board member. Insurance premiums paid to this agency were \$127,649 and \$123,234 for the years ended December 31, 2012 and 2011, respectively. No amounts are due and payable under this arrangement as of December 31, 2012 and 2011.

The Authority obtained contracted part time labor through a company for which the Authority's Executive Director and an Authority Board member serve as board members. Total expenses paid to the Company were \$247,079 and \$293,536 for the years ended December 31, 2012 and 2011, respectively. In addition, the Authority had accrued expenses of \$10,077 and \$8,877 as of December 31, 2012 and 2011, respectively.

The Authority obtained building maintenance services through a company for which the Authority's Executive Director is a board member. Total expenses paid to the company were \$160 and \$8,448 for the years ended December 31, 2012 and 2011, respectively. No amounts are due and payable under this arrangement as of December 31, 2012 and 2011.

The Authority obtained printing services through a company owned by the Deputy Executive Director's father. Total expenses paid to the company were \$8,343 and \$8,208 for the years ended December 31, 2012 and 2011, respectively. In addition, the Authority had accrued expenses of \$844 as of December 31, 2012.

HATFIELD-MCCOY REGIONAL RECREATION AUTHORITY**NOTES TO FINANCIAL STATEMENTS**

The Authority obtained catering services through a company owned by the Executive Director's mother for Board meetings and staff meetings. Total expenses paid to the company were \$3,399 for the year ended December 31, 2012. No amounts are due and payable under this arrangement as of December 31, 2012 and 2011.

During the year ended December 31, 2012, the Authority received funds from the WV Division of Tourism grant for which the Executive Director serves as a board member for WV Division of Tourism. Total funds received were \$36,719 for the year ended December 31, 2012. No amounts are receivable under this arrangement as of December 31, 2012, and no amounts were received or receivable under this arrangement for the year ended December 31, 2011.

Note 9. Risk Management

The Authority is exposed to various risks of loss related to torts; theft of, damage to and destruction of assets; errors and omissions; employee health and life coverage and natural disasters. The Authority has purchased property and casualty insurance through the State of West Virginia's Board of Risk and Insurance Management (BRIM) and a commercial insurance carrier and employee health insurance and coverage for work-related accidents and injuries through commercial insurance carriers.

BRIM is a public risk pool that provides for general, property, medical malpractice, and automobile liability. Amounts paid to BRIM for the years ended December 31, 2012 and 2011 were \$30,618 and \$43,158, respectively.

In exchange for payment of premiums to BRIM and commercial insurance companies, the Authority has transferred its risks for property loss, employee health coverage and employee work related injuries.

Note 10. Post Employment Benefits Other than Pension

The Authority participates in the West Virginia Retiree Health Benefits Trust Fund (the Plan), a cost-sharing multiple-employer defined benefit post-employment healthcare plan administered by the West Virginia Public Employee Insurance Agency (WVPEIA). The Plan provides retiree post-employment health care benefits for participating state and local government employers. The provisions of the Code of West Virginia, 1931, as amended (the Code), assigns the authority to establish and amend benefit provisions to the WVPEIA board of trustees. The WVPEIA issues a publicly available financial report that includes financial statements and required supplementary information for the Plan. That report may be obtained by writing to Public Employees Insurance Agency, 601 57th Street, S.E., Suite 2, Charleston, West Virginia 25304-2345, or by calling 1-888-680-7342.

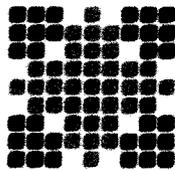
The West Virginia Code requires the Plan to bill the participating employers 100% of the Annual Required Contribution (ARC), an amount actuarially determined in accordance with the parameters of GASB Statement 45. The ARC represents a level of funding that, if paid on the ongoing basis, is projected to cover normal cost each year and amortize any unfunded actuarial liabilities (or funding excess) of the plan over a period not to exceed thirty years. Plan employers are billed per active health policy per month.

The Authority's ARC was \$67,699, \$143,702 and \$151,213 and the Authority has made contributions to the OPEB Plan of \$67,699, \$26,914 and \$29,396, which represents 100%, 18.73% and 19.44% of the ARC, respectively, for the years ending December 31, 2012, 2011 and 2010, respectively, which resulted in net liabilities of \$424,869, and \$357,170, which are included in the Authority's Statement of Net Position as of December 31, 2012 and 2011, respectively.

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RECREATION AUTHORITY**

***Financial and
Compliance Report***

December 31, 2013



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HATFIELD-MCCOY REGIONAL RECREATION AUTHORITY**NOTES TO FINANCIAL STATEMENTS**

*** Note 8. Related Party Transactions**

The Authority leases an industrial storage building from the Wyoming County Economic Development Board, for which one Authority board member is an employee and one Authority member and the Authority's Executive Director serve on its Board, under an operating lease on a month-to-month basis. Rent expense for the operating lease was \$14,500 and \$13,500 for the years ended December 31, 2013 and 2012, respectively. No amounts are due and payable under this arrangement as of December 31, 2013 and 2012.

The Authority obtained liability insurance through an insurance agency owned by a board member. Insurance premiums paid to this agency were \$135,437 and \$127,649 for the years ended December 31, 2013 and 2012, respectively. No amounts are due and payable under this arrangement as of December 31, 2013 and 2012.

The Authority obtained contracted part time labor through a company for which the Authority's Executive Director and an Authority Board member serve as board members. Total expenses paid to the Company were \$245,192 and \$247,079 for the years ended December 31, 2013 and 2012, respectively. In addition, the Authority had accrued expenses of \$15,661 and \$10,077 as of December 31, 2013 and 2012, respectively.

The Authority obtained building maintenance services through a company for which the Authority's Executive Director is a board member. Total expenses paid to the company were \$19,449 and \$160 for the years ended December 31, 2013 and 2012, respectively. No amounts are due and payable under this arrangement as of December 31, 2013 and 2012.

The Authority obtained printing services through a company owned by the Deputy Executive Director's father. Total expenses paid to the company were \$6,740 and \$8,343 for the years ended December 31, 2013 and 2012, respectively. In addition, the Authority had accrued expenses of \$844 as of December 31, 2012.

The Authority obtained catering services through a company owned by the Executive Director's mother for Board meetings and staff meetings. Total expenses paid to the company were \$2,488 and \$3,399 for the years ended December 31, 2013 and 2012, respectively. No amounts are due and payable under this arrangement as of December 31, 2013 and 2012.

The Authority obtained vehicle maintenance services through two companies owned by a board member. Total expenses paid to the companies were \$16,511 and \$7,794 for the years ended December 31, 2013 and 2012, respectively. No amounts are due and payable under this arrangement as of December 31, 2013 and 2012.

During the year ended December 31, 2012, the Authority received funds from the WV Division of Tourism grant for which the Executive Director serves as a board member for WV Division of Tourism. Total funds received were \$36,719 for the year ended December 31, 2012. No amounts were received or receivable under this arrangement as of December 31, 2013.

Note 9. Risk Management

The Authority is exposed to various risks of loss related to torts; theft of, damage to and destruction of assets; errors and omissions; employee health and life coverage and natural disasters. The Authority has purchased property and casualty insurance through the State of West Virginia's Board of Risk and Insurance Management (BRIM) and a commercial insurance carrier and employee health insurance and coverage for work-related accidents and injuries through commercial insurance carriers.

BRIM is a public risk pool that provides for general, property, medical malpractice, and automobile liability. Amounts paid to BRIM for the years ended December 31, 2013 and 2012 were \$26,530 and \$30,618, respectively.